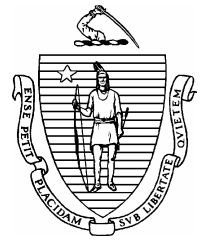


Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-03-4

QUESTION

Is the Martha's Vineyard Commission (MVC) a "municipal agency" for purposes of G. L. c. 268A?

ANSWER

We continue to conclude that the MVC is a "municipal agency" as that term is defined in the conflict of interest law. Accordingly, members and employees of the MVC are municipal employees for purposes of applying G. L. c. 268A to their conduct.

We also take this opportunity to analyze the enabling legislation for the Cape Cod Commission and conclude, for the reasons described below, that it is a "county agency" as that term is defined in G. L. c. 268A.

FACTS

You are counsel for the MVC and have asked the Commission to reconsider its conclusion in *EC-COI-91-3* that the MVC is a "municipal agency" for purposes of G. L. c. 268A. The first seven paragraphs of the facts set forth in the Commission's *EC-COI-91-3* opinion are relevant, and we restate them in this opinion.

"The Martha's Vineyard Commission was created as a 'public body corporate' by Chapter 831 of the Acts of 1977, 'to further protect the health, safety and general welfare of island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard ... by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies.' §§1, 2.¹ Every local municipal land regulatory agency is governed by the standards, regulations and criteria established by the MVC in considering applications for development permits relating to areas and developments subject to Chapter 831. § 5."

"The MVC is comprised of twenty-one members, of which six members are Selectmen in the member towns, or their designees; nine members are elected island-wide; one member is a Dukes County Commissioner; one member is appointed from the Governor's Cabinet; and four, non-voting members whose principal residence is not on Martha's Vineyard, are appointed by the Governor. § 2."

"The MVC receives its funding through the yearly property tax levies in the individual municipalities. § 4. The MVC may also accept private contributions and state or federal grants. §§ 3, 4."

"One of MVC's statutory responsibilities is the designation of critical planning districts within Martha's Vineyard and the regulation of development within these critical planning districts."

Districts of critical planning concern are areas which require protection for natural, cultural, ecological or historical reasons or which may be unsuitable for intensive development. § 8. Following nominations from individual towns or from seventy-five taxpayers, the MVC may designate specific areas to be districts of critical planning concern. § 8. The legislation requires the MVC to adopt regulations for the control of districts of critical planning concern,² and to specify broad guidelines for the development of the district. §§ 3, 7, 8. The Secretary of the Executive Office of Environmental Affairs is required to approve the standards and criteria which the MVC proposes to use in designating an area as one of critical planning concern.”

“When the MVC approves a critical planning district, the municipalities in which the district is located may adopt regulations governing development within the district in accordance with the MVC guidelines and submit the regulations to the MVC for approval. If the regulations are not in conformance with MVC guidelines, or if a municipality fails to adopt regulations the MVC will adopt regulations. All adopted regulations are incorporated into the municipality's official ordinances or by-laws and are administered by the municipality. §10. A municipality may only issue a development permit in a district of critical planning concern in accordance with regulations provided by MVC. § 9.”

“The MVC's second statutory responsibility is to develop criteria and standards to determine when a development project will be considered a development of regional impact³ and to review and approve all applications for developments of regional impact. §§ 12, 14. Generally, developments of regional impact (DRI) are those developments which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues which are significant to more than one municipality. § 12.”

“If a municipality determines that a development application meets the MVC DRI criteria, it must refer the development application to the MVC. § 13. The MVC is required to review all DRI permit applications, hold a hearing, and make findings concerning whether the probable benefits of the project outweigh the probable detriments, whether the proposed development will substantially interfere with the objectives of a municipality's or the county's general plan, and whether the proposed development is consistent with any municipality or MVC regulations. § 14. Absent approval by the MVC, a municipality may not grant a development permit for a DRI. §16. Furthermore, the MVC may specify conditions to be met by the developer in order to minimize any economic, social or environmental damage. § 16.”

We include the following additional facts.⁴ The MVC may adopt regulations for control of districts of critical planning concern and in adopting such regulations may include any type of regulation a city or town may adopt under: G. L. c. 40, § 8C;⁵ G. L. c. 40A;⁶ G. L. c. 41, §§ 81K-81GG;⁷ G. L. c. 111, § 27B⁸ as related to regional health board, and G. L. c. 131, §§ 40, 40A⁹ as pertaining to wetlands protection.¹⁰ “In making a finding of the probable benefits and detriments of a proposed development, the [MVC] shall not restrict its consideration to benefits and detriments within the municipality of the referring agency, but shall consider also the impact of the proposed development on the areas within other municipalities.”¹¹ “Any party aggrieved by a determination of the [MVC] may appeal to the superior court within twenty days after the [MVC] has sent the development applicant written notice, by certified mail, of its decision and has filed a copy of its decision with the town clerk of the town in which the proposed development is located.”¹²

In addition, because you have asked us to compare the MVC to the Cape Cod Commission (CCC), we include the following information about the CCC.¹³ We observe that the CCC is

generally very similar in structure and function to the MVC as both involve planning functions for the concepts of “developments of regional impact”¹⁴ and “districts of critical planning concern.”¹⁵ Rather than reiterate all the similarities here, we note the following aspects of the CCC that do not have similar provisions in the MVC enabling legislation. The Act establishing the CCC, St. 1989, c. 716, specifies that all of Cape Cod, which is coterminous with Barnstable County, is subject to the CCC’s jurisdiction.¹⁶ “The [CCC] shall be an agency within the structure of Barnstable county government pursuant to this act, and shall operate in accordance with Barnstable county administrative and budgetary procedures.”¹⁷

The “Assembly of Delegates” which is the legislative body for Barnstable County,¹⁸ must review and approve or disapprove the CCC’s “proposed regulations of general application to enable it to fulfill its duties . . . , including, but not limited to, regulation concerning the process of designating districts of critical planning concern; the review of developments of regional impact, and the imposition of impact fees . . . ,” the CCC must submit such proposed regulations to the Assembly of Delegates “for adoption by ordinance.”¹⁹ Similarly, the Assembly of Delegates must hold at least one public hearing to consider the CCC’s “final regional policy plan” and shall either adopt the final regional policy plan by ordinance or return it to the CCC for restudy and redrafting.²⁰

When the CCC proposes designating certain areas that are of critical value to Barnstable County as “districts of critical planning concern,”²¹ the CCC must submit a proposed designation to the Assembly of Delegates for adoption by ordinance.²²

The CCC is funded under procedures established by the Barnstable County home rule charter.²³ A budget proposal for a fiscal year must be submitted annually under Barnstable County administrative and budgetary procedures.²⁴ Subject to the Barnstable County home rule charter, the CCC may levy reasonable fees to recover its regulatory activities and services that it provides.²⁵ If the CCC’s budget exceeds its revenues by a certain amount specified in § 18(d)(i), the Assembly of Delegates must seek voter approval in order to assess an amount in excess of that limit.

DISCUSSION

The issue before us is whether the MVC is a state, county or municipal agency for purposes of applying G. L. c. 268A to its members and employees.²⁶ A “state agency” is defined as “any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of county, city or town.”²⁷

The definitions of “county agency” and “municipal agency” are similar, but do not include the phrase, “any independent . . . authority, district, commission, instrumentality or agency.” A county agency is “any department or office of county government and any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.”²⁸ A municipal agency is “any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.”²⁹

Since the enactment of G. L. c. 268A in 1962, numerous public agencies have been created to function at the state, county or municipal levels of government. It is fair to observe

that, since then, not every public agency created by an act of government necessarily fits precisely into one of the three definitions specified in G. L.c. 268A. Although the MVC enabling act states that it “shall be a public body corporate,” it does not expressly state whether the MVC shall be a state, county, or municipal agency for purposes of G. L. c. 268A.³⁰ As a result, it has been left to the Ethics Commission to employ a reasonable interpretation in determining which statutory definition most closely applies to a public agency or instrumentality. As has often been observed, the conflict of interest law must be given a “workable meaning”³¹ and the Commission has long endeavored “to construe the law so as to effectuate its purpose to the extent it is reasonable to do so.”³²

In determining whether a public instrumentality is a state, county, or municipal agency we focus on whether the agency primarily serves the state, county, or municipal levels of government.³³ “When an agency possesses attributes of more than one level of government, the State Ethics Commission will review the interrelation of the agency with the different governmental levels.”³⁴ We consider which level of government funds and oversees the agency, and whether the agency carries out functions similar to those of a particular level of government.³⁵

Applying these factors to the MVC, we continue to conclude that it is a municipal agency. Its member municipalities, rather than state or county officials, control the MVC. Only one MVC member is a Dukes County Commissioner, or his designee.³⁶ As we observed in *EC-COI-91-3*, we continue to conclude that municipal control and service to municipal issues dominate the MVC. Although the MVC exists to address issues about developments that affect interests beyond the specific municipality in which they are located, the MVC planning process is primarily a collaborative effort among the member municipalities, rather than an external control imposed by a state or county entity.

You have suggested arguments for two alternative analyses. First, you submit that we should determine that the MVC is a state agency because its purpose is to assure “that regional development on Martha’s Vineyard protects the regional and state-wide values which the legislature has found to be at risk in the absence of the [MVC].” Alternatively, you suggest that we compare the MVC to the CCC and conclude the MVC better fits within the county, rather than municipal, level of government for purposes of the conflict of interest law.

We decline to adopt either alternative. There are several significant differences between the CCC and the MVC, as we have described above. Unlike the CCC, the MVC is not required to submit its regulations, regional plan, or development standards to a county assembly of delegates or county commissioners for review and approval. The MVC’s enabling legislation does not require it to follow Dukes County administrative and budgetary procedures. Moreover, the CCC, which was created after the MVC, plainly allows Barnstable County greater input and control than what is afforded to Dukes County in the MVC enabling legislation. Simply put, Dukes County government does not have the type of regulatory review over the MVC that Barnstable County government has over the CCC. Finally, the MVC does not have jurisdiction over all the land within Dukes County while the CCC covers all of Barnstable County.

Similarly, we do not believe that the MVC falls within the definition of “state agency.” As the Commission observed in *EC-COI-91-3*, the MVC does not have jurisdiction over Commonwealth land and the municipal representation outweighs the Commonwealth’s representation on the MVC. The “MVC’s relationship with municipal government outweighs its relationship with” state government.³⁷

You also submit that we consider a Superior Court decision concluding that the MVC is not a “local board” within the meaning of G. L. c. 40B, § 20 because the MVC “does not perform local functions, it performs regional ones.”³⁸ For the following reasons, we conclude that the Superior Court’s decision does not determine the issue before us.

The Superior Court’s decision did not consider G. L. c. 268A or any issues related to it. In describing the MVC as performing regional rather than local functions, the Superior Court said nothing about whether the MVC, should, as a result, be a “county agency” or “state agency” as those terms are defined in the conflict of interest law. The Superior Court concluded that because the MVC is not a “local board” as defined in G. L. c. 40B, § 20, a Chapter 40B housing project within the jurisdiction of the MVC “must be referred to the MVC before a local ZBA can act on it.”³⁹

The purposes of G. L. c. 40B are different from G. L. c. 268A. The definition of “municipal agency” in G. L. c. 268A, § 1(f) is very different from the definition of “local board” in G. L. c. 40B, § 20. In addition, although G. L. c. 40B, entitled “Regional Planning,” includes the enabling laws for the Metropolitan Area Planning Council and other similar regional planning districts, which the Ethics Commission has concluded are “state agencies,”⁴⁰ the MVC was not created pursuant to c. 40B.⁴¹ Accordingly, the application of the term “local board” in the context of G. L. c. 40B comprehensive permit for affordable housing does not answer the question of whether the MVC is a state, county, or municipal agency for purposes of G. L. c. 268A.

For all of the above reasons, we continue to conclude that the MVC is a municipal agency for purposes of applying G. L. c. 268A to its members and employees. As a result, its members and employees are municipal employees under the conflict of interest law.⁴²

Although we have not formally stated that the CCC is a county agency for purposes of G. L. c. 268A, we now conclude that the CCC is a county agency. First, as the Legislature expressly stated, the CCC is an “agency within the structure of Barnstable county government.” Further, our conclusion is bolstered by the significant extent of Barnstable County government’s regulatory control over the CCC. Barnstable County government must approve the CCC’s rules and policies. Although the CCC obtains funding from its member municipalities, its budget process is linked to Barnstable County government.

DATE AUTHORIZED: December 16, 2003

¹ The Elizabeth Islands, certain Indian lands and land owned by the Commonwealth are excluded from the MVC’s jurisdiction.

The citations to the sections of St. 1977, c. 831 appear in the text, rather than the endnotes, of *EC-COI-91-3*.

² The MVC may include local municipal regulations in adopting its regulations.

³ The MVC’s proposed criteria are subject to the approval of the Secretary of EOEa.

⁴ Unless stated otherwise, the cited sections refer to sections within St. 1977, c. 831. We have reviewed the MVC's enabling legislation as amended by St. 1979, c. 319, and St. 1992, c. 97. The amendments did not change the facts relevant to our analysis.

⁵ "Conservation commission; establishment; powers and duties."

⁶ " Zoning."

⁷ "Subdivision Control."

⁸ Regional health districts; regional board of health; powers and duties; administration; organization; management; accounts; rules and regulations."

⁹ "Removal, filling, dredging or altering of land bordering waters." § 40; "Orders protecting wetlands." § 40A.

¹⁰ St. 1977, c. 831, § 3.

¹¹ § 15.

¹² § 18. We note also another change since *EC-COI-91-3* was issued. Either a Dukes County Commissioner or his designee may serve on the MVC. St. 1992, c. 97, § 1

¹³ The CCC has consented to our reviewing its enabling legislation and formally determining its agency status for purposes of the conflict of interest law.

¹⁴ "A development which, because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality, and which conforms to the criteria established in the applicable standards and criteria for developments of regional impact pursuant to section twelve." St. 1989, c. 716 § 2(h).

¹⁵ See *CKA, LLC, Down Island Golf Club, Inc et al. V. Zoning Board of Appeals of Oak Bluffs and the Martha's Vineyard Commission*, Dukes County Civil Action 2001-00068 (May 29, 2002)

¹⁶ St. 1989, c. 716, § 1. Unless stated otherwise, the following citations refer to sections in St. 1989, c. 716, as amended by St. 1990, c. 2.

¹⁷ § 3(a).

¹⁸ § 2(b).

¹⁹ § 6(a).

²⁰ § 8(e).

²¹ § 10(a).

²² § 10(b).

²³ § 18(a).

²⁴ § 18(b).

²⁵ § 18(c).

²⁶ At the outset, we note that it cannot be denied that the MVC should be considered a public agency or public instrumentality for purposes of G. L. c. 268A, and you have not raised that issue.

²⁷ G. L. c. 268A, § 1(p).

²⁸ G. L. c. 268A, § 1(c).

²⁹ G. L. c. 268A, § 1(f).

³⁰ *Contrast* G. L. c. 71, § 89(v) (“Notwithstanding the provisions of this section or any other general or special law to the contrary, for the purposes of G. L. c. 268A: (i) a charter school shall be deemed to be a state agency.”).

³¹ *Graham v. McGrail*, 370 Mass. 133, 140 (1976). *See also* *Life Insurance Assoc. of Massachusetts v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

³² *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 427 (1992). *See e.g.*, *EC-COI-83-107*; *EC-COI-87-24*; *EC-COI-93-6*; *EC-COI-94-9*; *EC-COI-98-2*; *EC-COI-98-3*; *EC-COI-00-1*. As we concluded in *EC-COI-92-26*, we do not consider regional municipal entities to be “independent” municipal entities for purposes of applying the conflict of interest law, as we did in *EC-COI-91-3*, because the Appeals Court in *McMann*, while agreeing with the Commission’s conclusion that a regional school district is a municipal agency, questioned the statutory basis for including the term “independent” when that specific term is not recognized in G. L. c. 268A, § 1(f). *McMann* at 428, n. 5.

³³ *See e.g.*, *EC-COI-99-5*.

³⁴ *EC-COI-91-3*.

³⁵ *See EC-COI-99-5, and opinions cited therein.* In *EC-COI-99-5*, we concluded that a regional planning agency, the Hampshire Council of Governments, which was created as result of the dissolution of Hampshire County government, primarily serves and is controlled by its member municipalities, rather than the state. Accordingly, we concluded that it is a municipal agency for purposes of G. L. c. 268A.

³⁶ St. 1992, c. 97, § 1.

³⁷ *EC-COI-91-3*, n. 4.

³⁸ *CKA, LLC, Down Island Golf Club, Inc et al. V. Zoning Board of Appeals of Oak Bluffs and the Martha’s Vineyard Commission*, Dukes County Civil Action 2001-00068 (May 29, 2002), p. 16.

³⁹ *CKA, LLC, Down Island Golf Club* at 4. Such a conclusion is significant to affordable housing proponents and opponents because not only the town’s ZBA but also the MVC has **permit-granting authority** over a G. L. c. 40B project if the magnitude of the project makes it a development of regional impact within the MVC’s jurisdiction. As that Superior Court decision observes, a “local board” under G.

L. c. 40B, § 20 is “any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.” Under G. L. c. 40B, § such “local boards” may make only **recommendations** to their municipality’s zoning board of appeals, which is the municipal board authorized to issue a comprehensive permit or approval for an affordable housing project.

⁴⁰ *EC-COI-95-2*.

⁴¹ While the MVC’s regional planning attributes are similar to those of entities created under c. 40B, the Legislature did not refer to G. L. c. 40B in St. 1977, c. 831 or the amendments thereto, and the Legislature was obviously aware of regional planning entities created under c. 40B when it created the MVC. General Law Chapter 40B was first enacted by St. 1955, c. 374. The Southeastern Regional Planning and Economic Development District was created under G. L. c. 40B by St. 1968, c. 663 and the Metropolitan Area Planning Council was created under G. L. c. 40B by St. 1970, c. 849.

⁴² *See EC-COI-99-5*.